No. 11,861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, *et al.*,

Appellees.

APPELLEES' BRIEF.

OLIVER O. CLARK,
ROBERT A. SMITH,
643 S. Spring St., Suite 710, Los Angeles 14, California,
Attorneys for Appellees.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Jurisdiction of the Court.

The jurisdiction of the court in this proceeding, derives from those allegations of the complaint which allege a violation, by the City of Los Angeles, a municipal corporation, of the rights and immunities of appellees under the Fourteenth Amendment to the Federal Constitution. These allegations are set forth in *forty-six* paragraphs of the complaint herein [Tr. Vol. I, pp. 3 to 59, incl.].

Appellant's effort (his brief, p. 1) to limit the basis of jurisdiction to the allegation of *only four* of these *forty-six* paragraphs, is wholly misleading and unsound. The facts pleaded, and from which jurisdiction derives, are specifically hereinafter set forth, and reference thereto is hereby made.

Introduction.

In this suit plaintiffs seek a judgment that the action of the City Council of the City of Los Angeles, is unconstitutional and void, under the Fourteenth Amendment to the Federal Constitution, wherein on October 2, 1946, said Counsel purported to grant to the defendant John D. Gregg, a variance permit to excavate to a depth of one hundred feet, or more, for the commercial production of rock, sand, and gravel, an area of land containing about 115 acres situated *in the heart of a residential community* comprising about one and one-half square miles, from which said operations then were, and for more than twenty years continuously theretofore had been, *excluded* by zoning regulations. Plaintiffs contend that this legislative act is an *unreasonable* exercise of the police power in the circumstances of this case.

During a period of thirty-two years immediately preceding the grant of this permit, this community area had been *continuously* protected against the rock industry. This exclusion was accomplished, during the first twelve years of this thirty-two year period, by deed restriction, and during the next twenty years, by zoning regulation.

Under the *encouragement* of this protection against the permanent, devastating, influence of such operations, this small community area was improved during said period, with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; *two churches,* attended by more than 300 persons each Sunday; a kindergarten and elementary grade school attended by 418 pupils; a public park and recreation center attended by more than 200 persons each

day, and 2,000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center, for the maintenance of which the City expends about $6,000 annually; about one and one-half miles of concrete paved streets which were improved at the expense of the property within said area; the installation, at the expense of the property within this area, of an adequate water supply and distribution system; a City Fire Department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion Hall adequate for the needs of its membership of 118, and a Medical Clinic.

During the two and one-half years immediately preceding the grant of this permit (October 2, 1946), fourteen home owners, at a cost to them of more than $150,000 purchased and improved their home properties which lie either *immediately adjoining,* or *immediately across a forty foot street* from, said critical area.

In their purchase of these homes many of these purchasers first inquired of the City as to the zoning restrictions, and were told by the City that this area was zoned for *residential* use, and that several applications for permission to excavate rock aggregates in this community area had been denied by the City. These persons would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates.

The conduct of operations as permitted by said variance permit, would substantially interfere with, and impair,

the comfortable enjoyment of their homes, create a serious hazard to the health and lives of the residents within said community, particularly of the young children and aged people; would substantially depreciate the value of the properties within said community, and would leave a large permanent pit one hundred feet deep, *as a permanent hazard*, within this community area.

The defendant Gregg purchased these 115 acres of land during a period of five years immediately preceding the grant of this permit, for an aggregate sum of about $75,000. These 115 acres of land are well adapted to residential development and use; are in substantial demand for that use, and for that use have a reasonable market value in excess of $275,000—a profit to Gregg, *for residential development,* of more than $200,000, or nearly three hundred per cent upon his short time investment.

During this thirty-two year period of *residential encouragement,* development, use, and protection against any invasion by the rock industry, *no substantial change in conditions* has occurred within this community area. It is now, and consistently has been throughout that thirty-two year period, a *residential community* enjoying a normal development, *under the exclusion of the rock industry,* by the addition of homes; churches; public educational and recreational facilities; utilities; paved streets, and a high type of residents banded together for community development and protection in customary civic associations.

In the circumstances pleaded, and but briefly reviewed hereinbefore, the plaintiffs contend, and, assuming the truth thereof, the learned trial court held, that the grant of this permit was an unreasonable exercise of the police

power, and therefore, was in violation of the Fourteenth Amendment to the Federal Constitution, and is void. Thereupon, the order of injunction of which appellant here complains, was issued to maintain the *status quo,* pending a trial of the case upon its merits.

Statement of Facts.

The verified complaint pleads:

(1) that the defendant City is, and at all times mentioned in the complaint was, a municipal corporation organized and existing under a municipal charter in the State of California [Tr. Vol. 1, p. 4];

(2) that a map attached to said complaint, and made a part thereof, is a substantially correct representation, upon a scale of one inch to each one thousand lineal feet, of an area of land comprising about one and one-half square miles situated within said City of Los Angeles, and that the areas therein shown as highways; community park; community church; community chapel; community school; and homes for human residence, are substantially correct, and are devoted to said respective uses [Tr. Vol. 1, p. 60];

(3) that in said complaint, the area of said 115 acres of land, as shown upon said map, is referred to as the *"Critical"* area, and the area enclosed with a heavy line is referred to as the *"Community"* area and the area covered by said map is referred to as the *"Map"* area [Tr. Vol. 1, pp. 4 to 7, incl.];

(4) that in 1914, in accordance with a prior survey, the lands within this community area, having been theretofore subdivided for *residential*-agricultural use, were by deed restrictions, *restricted* to that

use and *against* the production of rock aggregates, for the next ensuing twenty years [Tr. Vol. 1, pp. 7, 8 and 10];

(5) that thereupon these lands were offered for sale, and many parcels were sold and developed for *residential uses* [Tr. Vol. 1, pp. 15 and 16];

(6) that in 1918, this area, then known as a part of Hansen Heights, was annexed to the City of Los Angeles [Tr. Vol. 1, p. 10];

(7) that in 1919, the residents of this area, in conjunction with those of a larger area, organized Mun. Imp. Dist. No. 9, and bonded their properties for $150,000, to obtain, and assure, and thereby obtained, an adequate water supply for this area;

(8) that in 1924, one Mrs. Lewis Kane, in violation of said deed restrictions, began the excavation of rock aggregates within said area, and was promptly and permanently enjoined by Dr. Hansen and the L. A. Land and Water Co., as the owners of the unsold portion of said lands, and of reversionary rights under said deed restrictions;

(9) that in July, 1925, nearly nine years before the expiration of said deed restrictions, the City enacted its *zoning* ordinance No. 52,421, by which this community area was declared to be a *residential* area, and from which *the mining of rock aggregates was excluded* [Tr. Vol. 1, pp. 10 and 11];

(10) that in June, 1926; May, 1927; August, 15th, 1927; and August 27th, 1927, by its enactment of its ordinances numbers, respectively, 55,129; 57,958, 58,624, and 58,375, *the city reaffirmed its*

zoning classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates [Tr. Vol. 1, p. 11];

(11) that in June, 1926, and in June, 1928, *upon petition of the people,* the City consummated proceedings for the concrete paving of about seven and one-half miles of the public streets within said area, and *assessed the costs* of said improvement upon the lands within said area [Tr. Vol. 1, p. 5];

(12) that in 1928, *upon petition of the people,* the City consummated proceedings for the organization of Mun. Imp. Dist. No. 57, and the acquisition and improvement of a fifteen acre public park and recreation center, on the westerly side of Wicks Avenue, immediately southerly of Dronfield Avenue, in said community area, and *bonded the property* within said community area, for the payment of its cost [Tr. Vol. 1, pp. 14 to 16, incl.]. This park is separated from said *critical* area, only by a street forty feet wide;

(13) that in June, 1930; February, 1933; September, 1934, and November, 1936, the City by its enactment of its ordinances numbers, respectively, 66,750; 72,327; 74,140, and 77,000 *reaffirmed its zoning* classification of this community area as a *residential area,* and its exclusion therefrom of the business of mining rock aggregates [Tr. Vol. 1, p. 11];

(14) that in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the City Planning Commission *reaffirmed its zoning* protection of this community, by denying five separate applications for permission to mine rock aggre-

gates within this community area. Two of these applications were appealed to, and denied by, the City Council. Three of these applications involved land covered by the permit challenged here [Tr. Vol. 1, pp. 11 to 13, incl.];

(15) that in 1942, *upon petition of the people,* the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst School was established within this community area, as shown upon said map, about 600 feet from the critical area covered by the permit under challenge herein [Tr. Vol. 1, pp. 17 to 20, incl.];

(16) that in 1944 the City began, and continued through 1945, and until March 7th, 1946, a comprehensive survey and study of zoning conditions, and on that date, March 7th, 1946, it enacted its comprehensive zoning ordinance, number 90,500, which became effective June 1st, 1946. By this ordinance, the City *reaffirmed* its classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates, upon the ground that the continuance of such restriction was "necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; * * * to facilitate adequate provisions for community utilities and facilities such as, transportation, water, sewerage, schools, parks and other public requirements, and to promote health, safety and the general welfare." [Tr. Vol. 1, pp. 20 to 22, incl. and p. 62];

(17) that during the *thirty-two year period* from 1914 (the year of the deed restrictions), to October 2nd, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, under the *encouragement* of said deed and *zoning* protection against the rock industry, was improved with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; *two churches,* attended by 418 pupils; a public park and recreation center attended by more than 200 persons each day, and 2000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center for the maintenance of which the City expends about $6,000 annually; a City Fire Department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion Hall adequate for the needs of its membership of 118 [Tr. Vol. 1, p. 48], and a Medical Clinic [Tr. Vol. 1, p. 22];

(18) that during the two and one-half years immediately preceding October 2nd, 1946, fourteen of the home owners in said community area, *at a cost to them of more than $150,000,* purchased and improved their home properties *which lie either immediately adjoining, or immediately across a forty foot street, from said critical area.* [Tr. Vol. 1, p. 44.] In their purchase of these homes many of these purchasers first inquired of the City as to the zoning restrictions, and were told by the City that this area was *zoned for residential* use, and that several applications for

permission to excavate rock aggregates in this community area had been denied by the City. These persons would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates [Tr. Vol. 1, pp. 15 to 18, incl., and pp. 38 to 44, incl., and pp. 48 to 49, incl.];

(19) that in 1946, the assessed value of the land and improvements in private ownership within this community area of one and one-half square miles, was about $500,000—an increase of about $150,000 over the preceding year. That this indicates an overall value, during 1946, of land in private ownership within said community area, of more than four million dollars ($4,000,000);

(20) that the lands which comprise the critical area involved here, have a reasonable market value of $2,500 per acre, *for residential development* and use, under zoning protection against the rock industry [Tr. Vol. 1, pp. 571 to 574, incl.];

(21) that the defendant Gregg paid for the 115 acres of land covered by this permit, during the *five years* immediately preceding October 2nd, 1946, an aggregate sum of about $75,000 [Exhibit 3];

(22) that there was at the time of the grant of said permit, and would be now were it not for said permit, a substantial demand for the land which comprises said critical area, for development and use for *residential* purposes, and that said land is reasonably adapted to that use [Tr. Vol. 1, pp. 47, 48 and 50, and p. 9, and pp. 571 to 574, incl.];

(23) that during this thirty-two year period of *residential* classification, development, use, and protection against the invasion by the rock industry, *no substantial change in conditions* has occurred within this community area. [Tr. Vol. 1, p. 31.] It is now, and consistently has been throughout that thirty-two year period, a *residential community* enjoying a normal development *under the exclusion of the rock industry,* by the addition of homes; churches; public educational and recreational facilities; utilities; paved streets, and a high type of residents banded together for community development and protection in customary civic associations [Tr. Vol. 1, pp. 9, and 21 to 22, incl., and 25];

(24) that immediately following the effective date (June 1st, 1946) of said comprehensive *zoning* ordinance number 90,500, the defendant Gregg applied to the Planning Commission of said City for a permit to excavate said critical area which was then owned by him [Tr. Vol. 1, pp. 27 to 28, incl.];

(25) that said application was denied by said Planning Commission, by the unanimous votes of all of its members, on July 25th, 1946, upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was *not* the highest and best use of said land; (2) that said property *is adapted* to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property and for that general area, *as evidenced by the residential development* in that immediate neighborhood; (4) that the pit which would be left after the excavation was completed,

would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the City's Master Plan of Zoning [Tr. Vol. 1, pp. 28 to 30, incl.];

(26) that thereupon the defendant Gregg appealed to the City Council from said adverse ruling by said City Planning Commission, and, in support of his appeal, *he falsely represented* that said property as to which he sought said permit, was situated in a district, the character of which *is unsuited* for residential purposes, and "is primarily *suitable only* for production of sand, rock and gravel" [Tr. Vol. 1, p. 30];

(27) that on October 2nd, 1946, eleven members of the City Council, each of whom on the preceding March 7th (upon the grounds, stated in paragraph 16 hereof), had voted to continue said twenty-one year zoning restriction against any excavation for the commercial production of rock aggregates in this community area, voted to grant this permit to the defendant Gregg, to excavate this 115 acre tract *in the heart* of this community area [Tr. Vol. 1, pp. 30 to 33, incl.];

(28) that this permit, in terms, authorizes Gregg to excavate this land to a depth of one hundred feet, *or more if Gregg chooses,* with banks having a slope,

of one vertical foot to each horizontal foot, and which at surface would extend to a line fifty feet from the abutting property or street, providing *only* that Gregg shall construct a 6-foot cyclone type mesh wire fence around said property, with barbed wire on the top, if the Fire Department approves; that no *permanent* plant, building, or structure, be installed or maintained on said property; that the mining be done by an electrically powered shovel and primary crusher; that the material be transported by a conveyor belt system through a tunnel under Glenoaks Boulevard to Gregg's present plant, and be processed at said plant, and that the fifty foot setback area be screen planted progressively as excavation proceeds [Tr. Vol. 1, pp. 30 and 31];

(29) that said application, and the grant of said permit, was, and is, *opposed,* not only by the City Planning Commission, but also by the City Board of Education, the Health Department of the City School System, the City Park, Playground, and Recreation Department, the principal and teachers of the School in this community area; the churches; the American Legion Post, and the people throughout a large area of which this community is a part [Tr. Vol. 1, pp. 34, 45 and 48];

(30) that the conduct of operations as permitted by this permit upon this 115 acre tract of land, would produce loud, raucous noises, and dust and dirt, that would be carried to the homes within said community area, and which would substantially interfere with, and depreciate, the comfortable enjoyment of said homes by the owners and occupants thereof, and

would constitute a substantial detriment to the health of the inhabitants of said community area, and would substantially interrupt, and interfere with the proper conduct of the school, and the supervised recreational courses of the City Recreation Department, in said public park in said community area [Tr. Vol. 1, pp. 36 to 38, incl.; pp. 51 to 53, incl., and p. 56];

(31) that the pit which would be created by the excavation of said area, would be attractive to children of tender years, and would be a substantial and permanent hazard and danger to the safety of the children in said community area, and that such hazard and danger would not be materially obviated by said prescribed fencing and screen plantings [Tr. Vol. 1, pp. 18, 28 to 29, incl., and 52 and 53];

(32) that since the grant of said permit, said defendant Gregg has conducted substantial excavation operations upon said critical area upon both sides of Glenoaks Boulevard, at the intersection of Peoria Street, for the avowed purpose of constructing a tunnel under said Glenoaks Boulevard, and that said operations were conducted upon 68 days beginning with October 3rd, 1946,—the next day after the grant of said permit, and ending on June 9th, 1947 [Tr. Vol. 1, pp. 50 and 51];

(33) that said operations constantly produced loud, raucous noises, and substantial quantities of dust and dirt; that said noises, dust and dirt carried to, and penetrated, the home of the named plaintiffs, and of many others within said community area; and substantially interfered with, disturbed, and depreciated, the comfortable enjoyment of said homes by the occupants thereof [Tr. Vol. 1, pp. 51 and 52, and Vol. 2, pp. 566 and 567];

(34) that there is an adequate, economically available supply of rock aggregates, equal in quality to the materials on deposit in the San Fernando cone, without interrupting or interfering with any residential development, and which is obtainable at a cost which the market can afford to pay [Tr. Vol. 1, pp. 33 and 34];

(35) that the conduct of operations under this permit, and the excavation of a *permanent pit one hundred feet deep* and *more than ninety acres in area,* in the heart of this community, would very substantially disturb the residents of this community in their comfortable enjoyment of their homes, and would very substantially depreciate the market value of their properties [Tr. Vol. 1, pp. 55 and 56];

(36) that the structure and placement of the materials which compose said lands within said critical area, are such that there is a reasonable probability that in the course of time, by natural processes of erosion, or otherwise, the side walls of a pit dug thereon, at their surface would recede, so that said pit would substantially encroach upon the public streets, and upon the improved lands which bound said critical area, and would thereby destroy some substantial portion thereof [Tr. Vol. 1, pp. 35 and 36, and Vol. 2, pp. 568 and 569];

(37) that, excepting for the plaintiff Dell'Olio, *each* of the plaintiffs is an owner of a parcel of land situated within said community area, which is, and for many years has been improved, occupied, and used, as and for residential uses and purposes, and has a reasonable market value in excess of $12,000,

and that each of said plaintiffs actually resides upon his said property with his family [Tr. Vol. 1, p. 40];

(38) that the conduct of operations upon said critical area, as authorized by said permit, would depreciate the reasonable market value of each of said home properties in a sum substantially in excess of $3,000, and that by the conduct of such operations, each of said plaintiffs would be damaged in a sum in excess of $3,000 [Tr. Vol. 1, p. 40];

(39) that the defendant Gregg threatens to, and will unless restrained by an order of Court, excavate said critical area for the commercial production of rock, sand, and gravel, as authorized by, and under the purported authority of said variance permit [Tr. Vol. 1, p. 59];

(40) that the conduct of said defendant City, in its grant of said variance permit in the circumstances of this case, is an unreasonable and oppressive exercise of its police power as to the persons and properties within said community area, and is in excess of the just limits of its police power, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, p. 53];

(41) that said conduct of said defendant City, constitutes a taking of the properties of these plaintiffs without just compensation, and without any public necessity therefor, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, p. 53];

(42) that said conduct of said defendant City, is an unwarranted invasion and confiscation of the

properties, and property rights, of these plaintiffs, and a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States [Tr. Vol. 1, p. 54];

(43) that in its grant of said permit said defendant City exercised its police power solely for the benefit of said defendant Gregg, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, pp. 54, 55];

(44) that in the circumstances of this case the defendant City was, and is, estopped to grant said permit [Tr. Vol. 1, pp. 56, 57];

(45) that in the circumstances of this case, the defendant Gregg is estopped to exercise any of the privileges of said permit, or to conduct said operations upon said critical area [Tr. Vol. 1, p. 50];

(46) that by reason of the operations conducted by said defendant Gregg, upon said critical area, under the purported authority of said variance permit between the date of the grant of said permit, and the commencement of this suit, each of the plaintiffs herein has been damaged in a sum in excess of $3,000, and that no part thereof has been paid, or satisfied, and that the whole thereof is owing and unpaid [Tr. Vol. 1, pp. 57, 58], and

(47) that none of these plaintiffs has any plain, speedy, or adequate, remedy at law [Tr. Vol. 1, p. 3].

Appellant, in his statement of the case, which statement is limited to three and one-half pages (App. Br. pp. 2 to 5, incl.), *ignores altogether* the important facts

which affirm conclusively, the fatal unreasonableness of the zoning action here complaind of, and *substantially misstates* the record as to other matters.

Appellant's omissions, and their aggravating character, are so obvious from a reading of the complaint (57 pages of the printed transcript) and the supporting affidavits, that further comment thereon is not necessary.

Appellant's important *misstatements* of the record, are five in number. These appear in Appellant's Brief at page 2, lines 3, 4, 7, 8, and 9, and at page 3, lines 7, 8, and 29, and at page 4, lines 6 and 7.

(App. Br. p. 2, lines 3 and 4):

Here, appellant states that this 115 acres of land has substantial value *only* for the excavation and production of rock, sand, and gravel. *This statement is untrue.* It is refuted by the allegations of the complaint [Tr. pp. 9, 21, 47 and 48]; by the affidavits of the realtors Albert M. Scheble [Tr. pp. 571, 572] and R. L. Farley [Tr. pp. 573, 574] and by the findings of the City Planning Commission [Tr. p. 396].

(App. Br. p. 2, lines 8 and 9):

Here, appellant states that since 1934, he had been operating a gravel pit and processing plant on property *adjoining* said 115 acres. *This statement is untrue.* The record shows that Gregg's pit is separated from this 115 acres by Glenoaks Boulevard, and by a strip of land 300 feet wide from which the rock industry has been excluded for more than 32 years by deed restriction and zoning, as herein shown [Complaint, Ex. A, Tr. p. 60], and that his processing plant is located more than 1,000 feet southerly from said 115 acres of land.

(App. Br. p. 3, line 7):

Here, appellant states that the opponents of this permit were given *full opportunity* to be heard before the City Council at the time this permit was granted. *This statement is untrue.* While the fact is of no importance here, nevertheless, *the fact is* that the opponents, including the representatives of the City Park and Play Ground Department, and Board of Education, were given 30 minutes to present an opposition that could hardly be outlined, much less presented, in the allotted time.

(App. Br. p. 3, lines 27, 28, 29):

Here, appellant states that the case initiated in the State Court by *other* aggrieved property owners, was brought *on behalf of the plaintiffs in this action. This statement is untrue.* None of the plaintiffs here ever joined in that case, or accepted any of the benefits thereof. In these circumstances the plaintiffs here are in no manner included in that case.

(App. Br. p. 4, lines 6 and 7):

Here, appellant states that the findings of fact and conclusions of law in the *State* case, determined every issue against the plaintiffs. *This statement is untrue.* But, if it were true, that fact would not aid appellant here. It would but emphasize the necessity, obvious to every careful observer, of a recourse to federal protection under the Fourteenth Amendment, against a most unreasonable exercise by a State, of its police power, and the failure of a State Court to protect its citizens against sovereign aggression in violation of both the State and the Federal Constitutions.

The Questions Stated.

I.

Is a grant, however made, of a permit to excavate for the commercial production of rock, sand, and gravel, in a large area within a residential community which for more than twenty years immediately preceding such grant, had been continuously restricted, by zoning regulations, against such operations, and which, during said period, had been extensively developed with homes, schools, churches, parks, public recreational facilities, paved streets, and domestic utilities, an unreasonable exercise of the police power, and therefore in violation of the State and Federal Constitutions, and void, in the absence of some substantial change of conditions within that residential area which reasonably justify the zoning change?

II.

When it appears that continuously for more than twenty years, a city has encouraged the development of a residential community under zoning restrictions against operations for the commercial production of rock, sand, and gravel within said area, and under said encouragements said restricted area has been extensively developed with homes, churches, schools, parks, and public recreational facilities, etc., is the city estopped, in the absence of any substantial change in conditions within said area, to grant a permit for the conduct of such commercial operations within said residential community?

III.

Is a suit in equity the appropriate proceeding to determine the constitutional limits, and the estoppel, of the exercise of its police power by a city, when it is claimed by persons adversely affected by such action that such action is unconstitutional and void?

IV.

Do the Federal Courts have jurisdiction in a suit in equity which challenges the constitutionality, under the Fourteenth Amendment of the Federal Constitution, of an exercise by a State of its police power in the enactment of zoning regulations?

V.

In a suit in equity maintained by a person claiming to be aggrieved by an exercise of police power, is the reasonableness, and validity, of the act complained of a judicial or a legislative question, and may the Court in such a suit determine that question upon its own investigation of the facts as to the reasonableness of such action, or is it bound by the determination of such facts by the legislative body, if there is any substantial evidence before such body tending to support its determinations?

VI.

In a suit in equity which challenges the constitutionality of an exercise of police power, is it a permissible function of a Court to enjoin a threatened interference, under such exercise of police power, with a person's right to own and enjoy his property?

VII.

May persons aggrieved by an unconstitutional exercise of the police power, and by the conduct of commercial operations thereunder by a person for whose benefit such action was taken, recover damages, both actual and punitive, arising from such an invasion of his right to own and enjoy his property?

ARGUMENT.

Appellant discusses the questions involved, under seven titles. We shall reply to these in the order he has adopted.

I.

The Complaint States a Cause of Action on Federal Constitutional Grounds.

Appellant contends (His Brief pp. 7 to 16, incl.) that the complaint here does not state a cause of action, *because:*

(1) If the permit had not been granted, and Gregg had commenced these operations notwithstanding said zoning restrictions, he could not be enjoined here because no Federal question would be involved (Brief pp. 8 and 9);

(2) he, Gregg, in the circumstances last stated, could have enjoined the City from interfering with his operations (Brief pp. 8 and 9);

(3) plaintiffs cannot complain, because this variance permit does not restrict plaintiffs in the use of their own property. It merely permits Gregg to make a natural use of his own property (Brief pp. 9 and 10);

(4) a lawful use of his own property, by Gregg, does not constitute an improper exercise by the City, of its police power (Brief p. 10);

(5) plaintiffs have no right to require the City to continue to restrict the use of Gregg's land because plaintiffs have no vested right in the maintenance of those restrictions (Brief pp. 10 to 16);

(6) if the City acted unreasonably in its grant of this permit, nevertheless, such conduct would be a

matter of State cognizance only—no Federal questions would be involved (Brief p. 11); and

(7) a City is not estopped to invoke its police powers by reason of its prior enactment of other zoning ordinances (Brief p. 15).

Each of appellant's criticisms, wherein of any importance here, is unsound, and is opposed to all applicable authority.

(1) As to the Nature of Gregg's Right to Excavate, and Its Influence on the Federal Question.

Appellant premises his arguments upon the basic doctrine that the right to remove materials from one's own property is an *inherent* incident of ownership.

Upon this conception he postulates his conclusion (His Brief pp. 8 and 9) that the grant of the permit did not give to him any right which he did not theretofore possess, and that if he, in the absence of such a permit, had begun this excavation, he could not be enjoined here, because no Federal question would be involved.

The argument is unsound. It ignores the fact, which is *just as basic* as the inherent right to remove materials, that one's enjoyment of his property is limited (restricted) by every *reasonable* exercise of the police power. Hence we find that an owner's inherent right to remove minerals from the land he owns, *may be permanently restricted* by a reasonable exercise of the police power. (*Marblehead etc. v. City,* 36 F. (2d) 242, 47 F. (2d) 528, 76 L. Ed. 540).

This sovereign right to prohibit the exercise of one's right in the enjoyment of property, has not been judicially denied in modern times. Its exercise is limited only by a

reasonable necessity for the prohibition in furtherance of the general public welfare.

The cases cited by appellant do not deny this fundamental doctrine. Each of them holds nothing more than that, in the circumstances there presented, it was an unreasonable exercise of the police power to prohibit an owner's exercise of his inherent rights, because the general public welfare *there* did not reasonably require such prohibition.

In the circumstances pleaded in the case at bar, it cannot be said upon any authority, that the twenty year zoning policy of exclusion, under which this residential community was builded, was an unreasonable exercise of the police power in its inception, or at the time when Gregg purchased this 115 acres of land (*fifteen years after this zoning policy was adopted*), or at the time Gregg applied for and obtained this variance permit.

Indisputably, the adoption of that zoning policy whereby this community area was set apart for *residential* development, and the rock industry was excluded from it, and the continuous enforcement of that zoning exclusion for more than twenty years, was a reasonable exercise of the police power.

It necessarily follows, therefore, that at the time Gregg applied for this permit, and until he received it, he had no right to excavate this land for the production of rock aggregates. His natural right to do so, was effectually suspended by this long standing zoning policy of exclusion, which had been adopted and maintained in a reasonable exercise of the police power.

In these circumstances, Gregg's right to excavate, if he has any right, stems from the variance permit which he

applied for and obtained, and not from any natural, or inherent, right to excavate. This permit, as an exception to the general zoning policy, is the measure of his right.

If it is a *reasonable* exercise of the police power, for a State to encourage a substantial residential development of a community, as pleaded here, by a *twenty year zoning exclusion of the rock industry* from that area; and then, *in the absence of any substantial change* in the residential character of that community, to grant a variance permit to excavate a 115-acre tract of land in the heart of that community, to a depth of one hundred feet or more, for the commercial production of rock aggregates, then this permit is valid, and Gregg's operations under it cannot be enjoined.

But, if in the circumstances shown here, the grant of this variance permit is an unreasonable exercise of the police power, then the grant is void, and Gregg cannot excavate his land because his natural right to do so has long been, and is, effectually suspended by the twenty year zoning policy under which this community has been builded.

The question here at issue, therefore, is the *reasonableness* of this exercise of police power in the grant of this permit. This presents a judicial question which arises under the Fourteenth Amendment to the Constitution of the United States, and, under all applicable authority, is cognizable in a suit in equity, by a party aggrieved, in a Federal Court.

The power of the court to maintain the *status quo* by enjoining any operations by Gregg under this permit, until the validity of this permit, under the Fourteenth Amend-

ment to the Federal Constitution, is finally judicially determined in this suit in equity, is an inherent equitable power of the Federal Court sitting in chancery. It has never been denied. Without its exercise the full damage of State action clearly in violation of the immunities of the Federal Constitution, the supreme law of the land, could be visited upon an aggrieved party before any final preventive judgment could be obtained.

Appellant's suggestion (Brief p. 8) that if *he* had not applied for or obtained said permit, but without it he had begun the operations here complained of, he could not be enjoined *here* because no Federal question would be involved, adds nothing to a proper discussion of the case at the bar.

Here, to stop Gregg, we complain of an unreasonable exercise of the police power, an unwarranted withdrawal of zoning protection, and, incidentally, of Gregg's operations under it to our serious and permanent damage. In the case assumed by appellant, we would not complain, to stop Gregg, of any State action. *We would affirm that action*—the zoning prohibition of Gregg's operations, and, in another forum, we would seek appropriate relief.

The perfectly obvious distinction between the case here and the caes assumed, is that here *we challenge* the validity of State action (a Federal question), whereas, in the case assumed, *we would affirm* the validity of State action, and under the mantle of its security we would seek appropriate relief (a State question) in the proper forum.

(2) As to Gregg's Right to Enjoin Any Enforcement of a Zoning Prohibition of Excavation Operations.

Appellant suggests (Br. pp. 8 and 9) that if he had begun to excavate his land without any permit under said zoning ordinance No. 90,500, and the city, in enforcement of said ordinance, had interfered with said operations he, Gregg, could have enjoined said city from such interference.

Appellant premises this conclusion upon his assumption that his natural right to remove these materials from his land is superior to the City's exercise of its police power in the enactment of said zoning ordinance. This, of course, as heretofore shown, is unsound. The authorities cited by appellant do not sustain appellant's position. They hold only that in the circumstances their presented zoning prohibition was an unreasonable exercise of the police power.

But, whatever the rights of the City and of Gregg *would have been,* in the circumstances assumed by Gregg, nevertheless, they are of no importance here. *The circumstances assumed have never arisen.* Gregg applied for and obtained this permit. The reasonableness of this grant *in the absence of any change in conditions,* after twenty years of zoning protection, is the question presented here. *This is a federal question.* It is not in any way impaired because in other circumstances, and in another forum, another and different question would be at issue.

(3) As to the Nature of This Variance Permit.

Appellant suggests (Br. pp. 9 and 10) that this variance permit does not restrain plaintiffs in the use of their own property but merely removes an artificial impediment to a lawful use by Gregg of his own property, and that such legislative action cannot constitute an improper exercise of the police power of the City. This argument is patently unsound.

The grant of this permit and the conduct of operations under it definitely restricts appellees in the use of their own property. The complaint pleads, as heretofore shown, that the conduct of such operations will substantially and seriously interfere with appellees comfortable enjoyment of their homes; and seriously jeopardize the health and lives of those who dwell upon appellees' properties, and will substantially, seriously, and permanently, depreciate the value of said properties. These, definitely, constitute a serious and substantial restriction upon appellees' use of their own property, and constitute a definite *pro-tanto* taking of their properties. (*Pac. Tel. & Tel. Corp. v. Eshalman,* 166 Cal. 640, 642; *People v. Ricciardi,* 23 Cal. (2d) 390, 398; *Pa. Coal Co. v. Mahon,* 260 U. S. 393, 415; *Averne, etc., v. Thatcher,* 278 N. Y. 222, 231.)

These considerations are ignored entirely by appellant in his assumptions, arguments, and conclusions. This court would not know from what Gregg says here, that his operations are in any way related to the security and future of this substantial residential community, or would in any way impair or destroy these heavy investments in homes, and in community facilities, which were made under this long zoning encouragement and protection. Yet this is the substance of this case.

(4) As to Gregg's Claim That It Is Not an Improper Exercise of Police Power to Permit His Lawful Use of His Property.

Appellant contends (his brief, p. 10) that the grant of this permit was not an improper exercise of police power inasmuch, so he says, as it does nothing more than to permit him to make a lawful use of his own property. This argument and conclusion wholly ignores the factual situation here. We have refuted it hereinbefore.

Appellant assumes that in all circumstances it is a proper exercise of police power to destroy, for the benefit of one who chooses to destroy his land, the homes, comforts, investments, and safety, of an entire community, and the inhabitants thereof, which has been builded under the encouragement of zoning regulation. A mere statement of the conditions pleaded here, and which appellant utterly ignores, demonstrates the unsoundness of his conclusion.

Were it otherwise, there would be no limit to the destruction which could be wrought by improvident public servants for the benefit of preferred interests. Investments, long encouraged, could be seriously impaired overnight, as here, and even destroyed, without any change in conditions which in common honesty and in the interest of the public welfare, as distinguished from the interest of some individual, would justify such destruction. Our society is not builded upon this concept. It is builded upon the concept that every exercise of the police power must be in furtherance of the general welfare, and that once a zoning policy has been established, and has been substantially acted upon, it may not be changed *in the absence of some substantial change in conditions to justify it,* to anyone's prejudice and detriment. (*Dobbins v. City of L. A.,* 49 L. Ed. 167; *Jardine v. City of Pasadena,* 199 Cal. 64.)

(5) As to Appellees Vested Right in the Continuance of Zoning Restrictions Upon Gregg's Property.

Appellant contends (his brief, pp. 10, 11, 13) that appellees cannot complain of the change in zoning policy which is challenged here, because appellees have no vested right to a continuance of zoning restrictions upon Gregg's property. The contention is patently unsound.

It is the law that a zoning regulation may be amended *"under new and changing conditions."* (*Jardine v. Pas.,* 199 Cal. 64; 48 A. L. R. 509; *Miller v. Board,* 195 Cal. 477; 38 A. L. R. 1497.) But no case holds that a zoning regulation, established and substantially acted upon by the persons affected, may be changed to the detriment of those persons, in the absence of new and changing conditions which reasonably require such change in zoning regulations.

That a substantial change in conditions, is an indispensable prerequisite to any substantial change in zoning regulations, to the detriment of one affected, is the unyielding principle upon which rest the cases which uniformly deny validity to any substantial change in zoning, *in the absence of any substantial change in conditions,* if such change is detrimental to the one who has relied upon that zoning. The case of *Dobbins v. L. A.,* 49 L. Ed. 167, is a clear example, and a controlling authority, in respect of this cardinal public policy.

It is undisputed, in this record, that no change has occurred in the residential character of this community.

It is not important whether, academically defined, this right is, or is not a vested right. In any event it is a right which a person acquires by his substantial investment in a zoned district, under the encouragement and protection of a zoning regulation, and which right persists

unless, and until, a change in conditions occurs, which makes it reasonably necessary, in the interest of the public welfare, to withdraw that zoning encouragement and protection. (*Dobbins v. L. A.,* 49 L. Ed. 167; *Jardine v. City of Pasadena,* 199 Cal. 64.)

This right includes, but it is not limited to, the use which one desires to make of his own property. He may properly complain, in his assertion of this right, against any unreasonable change in the permissive use of his own property, and, with equal force, against any unreasonable change in the permissive use of another man's property in the same zonal district.

The *Dobbins* case, *supra,* is an example of the assertion of this right as against a proposed change in the permissive use of one's own property.

The cases next hereinafter cited, are examples of the assertion of this right against a proposed change in the permissive use of another man's property contained within the same zonal district. (*Jardine v. City of Pasadena,* 199 Cal. 64; *Childs v. City Planning Com.,* 79 A. C. A. 996; *Patterson v. Board of Supervisors,* 79 A. C. A. 812; *Northside etc. Assn. v. County of L. A.,* 70 Cal. App. (2d) 598, also 609; *Miller v. Board of Public Wks.,* 195 Cal. 477; *Rubin v. Bd. of Dir.,* 16 Cal. (2d) 119; *Abbey Land Co. v. City of San Mateo,* 167 Cal. 434, and *Heischelderfer v. Quinn,* 287 U. S. 345, 77 L. Ed. 331.)

In each of these cases complaint was made only as to the proposed permissive use of another man's property. The right of the complainant to make that complaint, was not challenged. This right has never been challenged in any case within our knowledge.

This constitutional right to challenge a proposed change in the permissive use of another man's property in the

same zonal district, is basic, both in its origin and in its importance. It derives from the basic constitutional principle that every man must so use his property that its use will not unreasonably interfere with another man's use of his property.

Its importance lies in the indisputable fact, that some uses of property inevitably interfere substantially with the comfortable enjoyment and use of other property within the same general district. In the circumstances where the permissive uses of all of the properties within a zonal area, are established by a zoning regulation, and any change in the permissive use of any property within that area, may vitally affect the enjoyment and value of the permissive use of each, and all, of the other properties within that zonal area, any person whose interests within that zonal area, may be adversely affected by a proposed change in the permissive use of another man's property in that zonal area, may challenge, by appropriate judicial proceedings, the reasonableness, and hence the constitutionality, of the proposed change. This is the doctrine—the necessary doctrine—of all authority.

If, in these circumstances one may not challenge a proposed change in the permissive use of another man's property, then his comfortable enjoyment and use of his own property, although not directly involved in the proposed change, could be substantially interfered with and impaired, even destroyed, by an unconstitutional excess of legislative action under the police power. Clearly, such an unreasonable limitation upon one's constitutional rights to protect his home and property against unreasonable legislative and executive action, has never been the law of America.

The cases cited by appellant are not in point. *Heischelderfer v. Quinn,* 287 U. S. 315, cited by appellant as being particularly in point, is not in point at all. It deals only with changes in the location and maintenance of public improvements. It does not deal at all with changes in the permissive uses of private properties. The situation discussed and decided has no application to the facts here.

Under the encouragement and protection of the early deed restrictions, and of a 21-year zoning restriction, this community has experienced a very substantial growth and development as a residential community. Its homes, churches, schools, parks, and supervised recreational facilities, etc., fully verify this fact.

If, as the Supreme Court of the United States held in the *Dobbins* case, *supra,* an investment of $2500.00 under the encouragement of a zoning regulation, only a few months old, enacted by the City of Los Angeles, could not be impaired by a change in zoning without any change in conditions, then upon what ground may it be said, that the investments of these plaintiffs more than one hundred times greater, under a 21-year policy of zoning protection, may be impaired by a change in zoning without any change in conditions? It cannot be done.

It is clear, therefore, that the inhibitions of our constitutions, both state and federal, which forbid an impairment, by zoning change, of one's investments made under zoning encouragement and protection, in the absence of a change in conditions, recognize in the person affected, a substantial constitutional right which the courts are bound to respect and preserve against unnecessary and unreasonable legislative and executive invasion.

It is equally clear and fundamental, that the change in conditions which is indispensable to a change in a zoning

policy which has been substantially acted upon, must be a change in the conditions of the general area affected, and not merely a change in the fortunes or desires of one individual, or group of individuals (37 C. J., p. 734, Sec. 119; *Lawton v. Steele,* 152 L. Ed. 385, 388, 389; *I..... v. Smith,* 143 Cal. 168, 173).

(6) As to the Claim That the Constitutional Challenge Made Here Presents a Question of State Cognizance Only—That No Federal Question Is Involved.

Appellant contends (his brief, p. 11) that the validity of an unreasonable exercise of police power by a state, may be challenged only in a state forum, and that no federal question is involved. This position is unsupported by authority.

The cases are clear and numerous, which hold that an unreasonable exercise of police power by a state to the substantial detriment of a citizen violates the Fourteenth Amendment to the Federal Constitution, and may be redressed in the Federal Courts. The following cases are clear exemplars of this position: *Dobbins v. City of L. A.,* 49 L. Ed. p. 167; *Raymond v. Chicago Traction Co.,* 207 U. S. 20, 35; *Home Tel. Co. v. City of L. A.,* 227 U. S. 278; *Ex Parte Young,* 209 U. S. 123; *Snowden v. Hughes,* 321 U. S. 1; *Pennekamp v. Fla.,* 328 U. S. 331, 335; *Mugler v. Kansas,* 31 L. Ed., p. 205.

(7) As to the Estoppel of the Defendant City.

Appellant contends (his brief, p. 15) that a municipality may not be estopped to invoke its police powers by reason of its prior enactment of other zoning ordinances. This contention is unsound.

It is now established beyond doubt, and in many cases, that a governmental agency may be estopped in its exer-

cise of a governmental function. (*Times Mirror Co. v. City of L. A.,* 3 Cal. (2d) 309; *City of L. A. v. County of L. A.,* 9 Cal. (2d) 624, 630; *Farrell v. County of Placer,* 23 Cal. (2d) 624; *Garrison v. State of California,* 64 A. C. A. 973, 983.)

Equitable interference to prevent a sovereign aggression is not limited to factual precedent. In the *Times* case, *supra,* the Court said, *"Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those cases where right and justice would be defeated but for its intervention."*

Indubitably, the undisputed facts in the case at bar demand that the City be estopped in this threatened aggression. It would be a denial of every concept of justice, right, and morality, to deny the use of the injunctive process of the Court, to prevent this threatened despoliation of this community. A sovereign who, in the absence of any change in condition, after 21 years of continuous encouragement and protection, would destroy the fruits of its bidding, is a moral bankrupt, and an outcast in the society of good government.

It is no answer to this indictment, to say that the builders of this community, and the home owners within its gates, were not encouraged to do the community building they have done, by the City's 21-year policy of zoning protection against the rock industry. The suggestion is mere sophistry, both in fact and in law.

The facts speak with undeniable conclusiveness. The founders of this community began this encouragement by deed restrictions against the rock industry. Nine years before these expired, the City declared the desirability and perpetuation of this exclusion by its 1925 ordinance. These restrictions continued until the grant of this permit on

October 2, 1946. During that long interval of protection, these plaintiffs, and many others, under the encouragement of that protection, founded their homes, schools, churches, playgrounds, and other community facilities, at tremendous expense to themselves. These things they would not have done in the absence of this encouragement, and the assurance, implied in law, that the protection would not be withdrawn in the absence of such a substantial change in conditions as would reasonably justify such withdrawal.

The law speaks with equal finality. The law says that "It is proper zoning practice to set aside a sparsely settled area near the rapidly growing City of Los Angeles for residential purposes" (*Acker v. Baldwin,* 18 Cal. (2d) 341, 4, 5, 6, 7); that *when this is done there is an implied finding that such zoning is necessary for the Public Welfare* (*In re White,* 195 Cal. 516, 520, 521); that

> "A majority of the property owners might conceivably be content to bear the burden of taxes and other carrying charges, upon unimproved land in order to reap profit in the future from the development of the land for residential purposes. *They could not safely do so without reasonable assurance that the district will remain adapted for residential use and will not be spoiled for such purpose by the intrusion of structures used for less desirable purposes. The zoning ordinance is calculated to provide such assurance to property owners in the district, and to constrain the property owners to develop their land in a manner which in the future, will prove a benefit to the City."* (*Averne, etc. v. Thatcher,* 278 N. W. 222, 228.)

It is no answer to this indictment to say that the rock industry is a legitimate and necessary industry. Such

may be said of a commercial business; a lumber yard, and a livery stable.

But as to a commercial business, the Court in *Smith v. Collison,* 119 Cal. App. 180, 184, 186, 187, said:

> "The erection of a store is not in and of itself, a nuisance, but depending upon the facts of the case, may become a nuisance if erected in a residential zoned area.
>
> The evidence shows that the Altadena District is primarily a residential district and therefore that business and commercial establishments should be subordinate to the best interest and general welfare, of the whole district."

As to a lumber yard, the Court said, in *Magruder v. City of Redwood,* 203 Cal. 665, 671, that:

> "The objection to a lumber yard in a residence district is most obvious."

As to a livery stable, the Court said, in the *Magruder* case, *supra,* at page 671, that:

> "A person seeking for a livery stable in one of our modern cities would, as a rule, not only seek in vain, but also might subject himself to the suspicion of having just awakened from a sleep as prolonged and profound as that which made the name of Rip Van Winkle famous."

It must be borne in mind that *a residential use is a preferred use* under our governmental scheme. In emphasis of this, the Supreme Court of California in *Ex-parte Hadachek,* 165 Cal. 416, at page 421, said:

> "A business which when established, was entirely unobjectionable, may by the growth of population in the vicinity, become a source of danger to the health

> and comfort of those who have come to be occupants of the surrounding territory. If the legislature should then prohibit its further conduct, the proprietor can base no complaint upon the mere fact that he has been carrying on the trade in that locality for a long period."

It is no answer to this indictment to say that an estoppel here must fail because "fraud" is not shown.

Indisputably, "fraud" is not an essential element of an estoppel against a public body. No case holds that it is. Every case rests the estoppel upon the single basis that the action estopped, if permitted, "would defeat right and justice."

Within our knowledge, no Court since the turn of the century, has denied an estoppel against a public body, on the ground that fraud had not been shown, where *"right and justice required an estoppel to prevent manifest wrong."*

It is the result of the thing that is done, and not the manner of its doing, that invokes the estoppel. Neither good faith in doing a bad thing, nor bad faith in doing a good thing, can prevent or invoke, an estoppel.

This is the rule of all the cases. Necessarily this is so, because any Court would hesitate, excepting in a clear case (*like the case at bar*), to judicially declare that the public servants had acted fraudulently in the doing of a thing as to which an estoppel was invoked. But no Court would hesitate to estop such action where right and justice require it, even though the public body had acted in the best of good faith.

In the *Times Mirror Co.* case, *supra,* no one challenged the good faith of the public servants in their promises

and repudiation. Concededly, with no private axe to grind, they acted both in promise and repudiation, as they thought the public interest required. But they were estopped because, as the California Supreme Court said at page 330, that *"to give the acts of this city a very limited meaning, we think its conduct in the present case, at least equivalent to an oral agreement," which the City sought to repudiate, and that: "No Court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a City to bar it and its principal, the people, from the commission of such a grevious wrong."*

This is also true of each of the cases: *City of L. A. v. County of L. A., supra; Farrell v. County of Placer, supra,* and *Garrison v. State of California, supra.* No one claimed in those cases, that the governmental agency was estopped because of the fraud of its servants. Fraud was not an element of the estoppel successfully involved in those cases. It is not an element of the estoppel we invoke here.

The facts here *are a deadly parallel* to the facts in the *Times Mirror Co.* case, *supra.* Here, as there, the complainants were encouraged (by word of mouth there, by legislative zoning action here) to believe that if investments were made (in a commercial building there, in homes here) that these would be protected by the sovereign unless and until there should occur "some change in conditions" that, in right and justice, would justify a change in the sovereign's policy.

Here, as there, a substantial investment was made in reliance upon the inducements of the sovereign. Upwards of $1,500,000 during a two-year period, there.

Upwards of $2,500,000 during a 21-year period, and of $150,000 during the last three years of that period, here.

If, therefore, as the Supreme Court said in the *Times-Mirror* case, *supra:* "Right and justice require that the sovereign be there estopped to commit so grievous a wrong," upon what basis may it be said that the same sovereign should not be estopped here? There is no basis for any such discrimination."

It is important to note that Gregg made his investment in this 115 acre tract of land with full knowledge of the facts; that for 32 years the rock industry had been excluded from this community; that every attempt (and seven had been made) to mine rock aggregates in this community area, had been successfully repulsed; that during this 32-year period of encouragement and protection, homes had been built, families had been established, and churches, school, park and recreational facilities, desirable to a well rounded community, had been established, and that these contented dwellers within the gates did not want to move because John D. Gregg, a dweller without the gates, was running out of land to excavate.

Clearly, in the circumstances of this case, the choice of uses made by this sovereign 21 years ago in the enactment of its first zoning ordinance and steadfastly adhered to during the intervening years until the grant of this permit, against the officially expressed protests of the City Planning Commission, the Board of Education and the City Park and Playground Department, must remain as its choice today. Under all applicable authority, the acceptance of that choice by these people now estops this sovereign in its attempted repudiation of that choice for the benefit of John D. Gregg.

II.

Jurisdiction Here Rests Upon an Unreasonable Exercise of Police Power by a State, to the Substantial Prejudice of a Citizen, in Violation of the Fourteenth Amendment to the Federal Constitution.

Appellant contends (his brief pp. 17 to 25, incl.) that this suit is not within the jurisdiction of the Federal Court. He rests his conclusion upon five grounds:

(1) Diversity of Citizenship Is Not Shown.

The omission complained of is immaterial. Jurisdiction here, as hereinbefore shown, rests upon the presence of a Federal question, *the validity of State action,* which arises under the Fourteenth Amendment to the Federal Constitution. This jurisdiction ground is entirely independent of any diversity of citizenship, and when it is present, the diversity which is required in other circumstances, need not be pleaded or shown.

(2) Is There a Federal Question Presented?

Appellant again contends that there is no Federal question presented here. We have refuted that contention, conclusively, heretofore. But under this Point II, he approaches the question upon a somewhat different, but equally unsound, thesis.

He argues (his brief pp. 17 to 25, incl.) that the Supreme Court of California in *Wilkins v. San Bernardino,* 23 Cal. (2d) 332, 340, has held that a factual situation which properly invokes the constitutional protection, MUST FALL within one of four stated classifications; that the factual situation here is not within any of these, and therefore, no constitutional question is presented. But

that is not the holding in that case, and it is not the attitude of that Court.

In that case the Court was dealing with a specific challenge which is not the challenge presented here. It said that, in respect of the situation *there* presented, the constitutional immunity could be invoked only in one, or more, of four situations *"roughly"* defined as appellant states them. The Court did not attempt by precise definition to limit the factual precedent in which the Constitution could be invoked, to those it *"roughly"* stated. The Court did nothing more than to *"roughly"* state, arguendo, a general pattern within which, generally, the abuses of power of which complaint could properly be made, usually arose.

Appellant seizes upon this as dogma, and then by an attenuation which overemphasizes the importance of language in its relation to thought, concludes that the gross injustice of the sovereign aggression apparent here, is not within the broad concept of necessity upon which our founding fathers based the Fourteenth Amendment.

To know that the California Supreme Court never intended to be so misunderstood, one needs but to read what that honorable and learned Court has said in the variety of circumstances presented to it in which these constitutional guaranties have been invoked and applied. Notable among these is its statement in *Times Mirror Co. v. City of L. A.*, 3 Cal. (2d) 309, that *"equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those cases where right and justice would be defeated but for its intervention."*

But, *if* appellant's conclusion were the attitude of the State Court in respect of the security afforded by the

Fourteenth Amendment, it would not impair, it would accentuate, the jurisdiction of the Federal Courts, for such has never been the attitude of the Federal Courts, as the final arbiter of federal law. This is demonstrated in the *Dobbins* case, *supra,* and in the many other cases to which we have heretofore referred.

But, even within the dogmatism of the philologist, we conceive our grievance here to be well within the pattern of the third classification stated in the *Wilkins* case, *supra,* namely:

> *"Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance."*

The complaint pleads that the use of Gregg's property permitted by this variance permit, would substantially destroy the use of the properties of these plaintiffs for *residential* purposes,—*the only purpose for which they may be used under this ordinance,* and the only use to which they are adapted, because of their areas and improvement.

This unconstitutional invasion of our homes and investments, founded upon the encouragement of a twenty year zoning protection against the rock industry, is not mitigated by the assumption, or the fact, that if we chose to abandon our homes, and to apply for permission to excavate our properties for rock production, such permission would be granted. *Under the constitution we are not required to abandon our homes.* Economically, such abandonment and permission would be financial suicide.

Our properties, respectively, are too small to support any economic rock operations. We would be required to wait for a buyer until some large operator should choose to enter the field. Under conditions now obtaining and foreseeable *only Gregg would buy,* and *he would buy only when he chose,* and *only at his own price.* The creation of such a condition by zoning, is not sound governmental philosophy. It is not *"right or just."* In such circumstances the Fourteenth Amendment commands the intervention of the court to stop the sovereign hand.

The cases cited, and relied upon, by appellant, do not support his conclusions. None of them, in any respect, indicates any disposition of any court, to deny relief in the situation pleaded here.

Appellant's suggestion that *State action* is not involved here, because we plead an unwarranted delegation by the City, of its legislative power to its common council, is wholly without merit.

The Act complained of was done by the City as an agent of the State, in the exercise of its police power. If done under an unwarranted delegation of legislative power (a State question) *nevertheless* it was done in an *unreasonable* exercise of police power (a Federal question). The State question cannot be litigated here, and that allegation may be stricken, properly, from the complaint. The learned District Judge stated that he disregarded it. But the Federal question can be litigated here, and it is the undeniable right of these plaintiffs to pursue this remedy in the Federal Courts.

(3) Does This Case Arise Under the Federal Constitution?

Appellant's contention that this case does not arise under the Federal Constitution, is unsound.

The Fourteenth Amendment prohibits any substantial interference with a citizen's right to own and enjoy property, by an *unreasonable* exercise of the police power of a State. (43 Corpus Juris, p. 308, Sec. 319; *Mugler v. Kansas,* 31 L. Ed. pp. 205 to 211; *Crowell v. Benson,* 76 L. Ed. 598, 617; *Averne v. Thatcher,* 278 N. Y. 222, 231; *Pac. Tel & Tel. Co. v. Eshelman,* 166 Cal. 640, 662, 664; *Pac. Coal Co. v. Mahon,* 260 U. S. 393, 416.)

In the circumstances pleaded here, it appears beyond all doubt that the grant of this permit was an *unreasonable* exercise of police power.

(4) Does the Grant of This Permit Constitute a Taking of Property Without Compensation?

Appellant's contention that the grant of this permit does not constitute a taking of their properties without compensation, is patently unsound. Indisputably, a license to substantially impair and to destroy the enjoyment by plaintiffs of their homes, and the value of their properties, *is a substantial interference* with the enjoyment by these plaintiffs, of their homes.

It is settled law that any *unreasonable,* and substantial, interference with an owner's enjoyment of his property, under an exercise of the police power, is a taking of property within the prohibition of the Fourteenth Amendment (*Pa. Coal Co. v. Mahon,* 260 U. S. 393, 435), and that an actionable interference with a property right, can be no different from substantial impairment of that right (*People v. Ricciardi,* 23 Cal. (2d) 390, 398), and that

even a temporary deprivation of an owner's use of his property, is a taking of his property, in violation of the constitution, both State and Federal (*Pac. Tel. & Tel. Co. v. Eshelman,* 166 Cal. 640, 642, 662, 664; *Averne v. Thatcher,* 278 N. Y. 222, 231).

Under settled law, as heretofore shown, the heavy investments in homes, and in community facilities, under the encouragement of a twenty year continuous zoning protection against the devastating influence of the rock industry, invested these plaintiffs with the right to a continuance of this zoning protection until such a change in the residential character of this community should occur, as would *reasonably* justify the withdrawal of that protection.

Under the American concept of society, *the Sovereign must be reasonable* in its encouragement and discouragement of the development and *use* of property under the exercise of its police power. *It may not encourage the development of property, and then destroy the fruits of its bidding, by a change of mind, in the absence of such a change of conditions within the area affected, as may reasonably justify the change in zoning policy* (*Dobbins v. City of L. A.,* 49 L. Ed. 167; *Dunnigan v. Dist. of Col.,* 44 F. (2d) 892, 893; *Lawton v. Steele,* 152 L. Ed. 385, 388, 389; *Jardine v. Pas.,* 199 Cal. 64; *Miller v. Board,* 195 Cal. 477; *Averne v. Thatcher,* 278 N. Y. 222, 228; *Times Mirror Co. v. City of L. A.,* 3 Cal. (2d) 309; *Pac. Tel. & Tel. Co. v. Eshelman,* 166 Cal. 640, 662, 664; 37 C. J., p. 734 Sec. 119; 48 A. L. R. 509; 38 A. L. R. 1497; *Real Properties Inc. v. Board of Appeals of Boston,* 319 Mass. 180, 65 E. (2d) 199; 168 A. L. R. (1947), p. 13).

Any *unreasonable* change of mind by a sovereign in its exercise of its police power, to the substantial detriment of a person in his enjoyment of his property, is a *pro tanto* taking of his property and, if without compensation, is in violation of the Fourteenth Amendment, and is void.

(5) Is the Alleged Controversy Genuine or Present, Under the Federal Constitution, or Is It Merely Conjectural?

Appellant contends that the controversy here is not genuine or present, but is purely conjectural, because plaintiffs do not plead any discrimination in the grant of this permit, or that the power to grant such a permit may be administered in a discriminatory manner.

This contention is of no importance in the case at bar. Plaintiffs here do not challenge the constitutionality of this grant upon the ground (as did the Milling Co. in *People v. Globe, etc.,* 211 Cal. 121, cited by appellant) that the ordinance under which this grant was made, *grants an uncontrolled discretion* to the granting authority, which might be exercised in a discriminating manner. We do not complain here of that which might be done. We complain only because Gregg has been granted such a permit.

The unreasonableness of this exercise of police power does not reside in any failure to grant more permits. It resides in the grant of this permit to seriously impair, and to destroy, our property rights, and properties, established and improved under the encouragement of a twenty year continuous zoning policy of protection against the doing of that which this grant now permits to be done.

This controversy, therefore, is genuine and present. It is not conjectural. The conduct of these permissive operations, *now going on,* constitutes a genuine, present, subsisting, daily, and substantial, interference with, and

impairment of, the health and happiness of the families of these plaintiffs, in their use and enjoyment of their homes, and a very substantial depreciation of the value of their properties, and a very definite hazard to the future safety of their properties against natural erosion into the deep and permanent pit which Gregg's operations are producing in the immediate vicinity of our properties.

The actuality of these damages has been affirmed, frequently, by the courts, and never denied within our knowledge (*McIvar v. Merced-Fraser Co.,* 76 A. C. A. 304, 20 Cal. Jur. pp. 331, 332).

The sophistry inherent in appellant's argument, is readily apparent from an examination of the map which is attached to the complaint for purposes of illustration. The map shows, and the fact is, that the area of the properties of these plaintiffs, respectively, is too small to permit of any economical mining of rock aggregates, if plaintiffs so desired, and yet, if this permit is validated, the use of these properties for homes, for which use they have been extensively and expensively developed, is practically destroyed.

In these circumstances, each of these plaintiffs is as a lamb thrown to the wolves. He cannot use the property himself. He can sell only to an operator (John D. Gregg) who can use it, and who, in these circumstances, can *buy when he chooses,* and *upon his own terms,* and *at his own price.* Experience, *"that invaluable teacher,"* teaches with bitter memories that such as the economic attitude of one circumstanced as Gregg is, in relation to our properties, if this permit is validated.

III.

The Cause of Action Pleaded Here Is Not Essentially One to Enjoin the Commission of a Nuisance by Gregg. It Is One to Invalidate an Unreasonable Exercise of Police Power by a State Agency. In These Circumstances Diversity of Citizenship Is Immaterial.

Appellant contends (his brief pp. 26 to 30, incl.) that this action is essentially one to enjoin the commission of a nuisance by the defendant Gregg, and, since diversity of citizenship is not shown, jurisdiction lies solely in the State Courts. This position is unsound. It misconceives the basic reason for *appellant's* joinder as a defendant here.

Gregg is joined as a defendant because he is engaged in doing, *to plaintiffs' irreparable injury,* that which he is permitted to do *only under* an exercise of police power that is unreasonable and void. Except for this permit, Gregg's operations are prohibited, as they have been for twenty years, by a valid exercise of police power. To prevent this interference with our constitutional rights, it is necessary (a) to challenge the constitutionality of that permit; (b) to bring before the Court wherein the challenge is made, all persons who have a direct interest in the adjudication sought, and (c) to maintain the *status quo,* by injunctive process, pending that final adjudication.

The following authorities support this joinder (*United States v. Classic,* 313 U. S. 299; Moore's Fed. Prac., Vol. 2, pp. 2135, 2157; *Talbutt v. Sec. Tr. Co.,* 22 Fed. Supp. pp. 241, 242; *Caldwell v. Taggart,* 7 L. Ed. 828; *Gregory v. Stetson,* 133 U. S. 579, 586, 33 L. Ed. 792; *Ribon v. Chi. Rd. Co.,* 21 L. Ed. 367; *Commonwealth etc. v. Smith,* 266 U. S. 152, 158, 69 L. Ed. 219; *Franz v. Buder,* 11

F. (2d) 854, 856; *Sioux etc. v. Trust Co.*, 82 Fed. 124, 126, 43 L. Ed. 628; *Texas v. Interstate Commerce Comm.*, 258 U. S. 158, 163).

In the case last cited, the Supreme Court of the United States said:

> *"The bill makes it plain that the carriers and employees have put the Board's decision into effect, and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; and, should it be resolved against the validity of Title III and the Board's action annulled, their interests would be directly and unavoidably affected.*
>
> *"To take up and solve the controversy without their presence, and without their being represented, would be quite inadvisable, considering the exceptional nature of our original jurisdiction."*

The fact that Gregg's operations constitute a nuisance is only incidentally involved. It is not the basis of his joinder. The fact that his interests are directly involved and affected, is the basis of his joinder. It is of no importance, therefore, to discuss the applicable rules of joinder and pleading where jurisdiction rests solely upon a nuisance which it is sought to abate.

The annexation of conditions to Gregg's operations, as made by the Court in the State case to which these plaintiffs are *not* parties, and which were not made in the grant of this permit, although observed (*if* they are) by Gregg, is of no importance since this action does not seek primarily to abate a nuisance, but seeks primarily to void an *unreasonable* exercise of the police power of the defendant City.

However, the annexation of those conditions by the Court, emphasizes the unreasonableness of the grant which omitted them. If, as the State Court said by its action, the grant was unreasonable because these conditions were not imposed by the legislative body, then the grant was void, and, being, void, it could not be made alive by a judicial fiat which supplied the fatal omissions. The reasonableness—the validity—of this grant must be measured by the grant as made by the legislative body, and not by a grant upon conditions which have been superimposed by a court, and to which the legislative body has never given its consent.

IV.

The District Court Did Not Err in the Scope of Its Preliminary Injunction. The Restraint Imposed Is Not Greater Than Is Required to Maintain a Status Quo.

Appellant's criticism of the scope of this preliminary injunction, rests upon his erroneous assumption that dust, noise, aesthetic offense, and possible erosion, are the only injuries threatened, against which plaintiffs seek relief, and that all of these are adequately provided against by the terms of the permit, and by a judgment obtained in a case in the state court by other property owners, and, therefore, there is practically nothing complained of here, which should be preliminarily enjoined (his brief, p. 31).

There is no doubt as to the rule. An injunction, whether preliminary or permanent, should not extend beyond that which is reasonably required to protect the rights invaded.

But, a determination of the restraint reasonably required to maintain a *status quo* pending trial and judgment, rests in the sound discretion of the trial court, upon the facts preliminarily found by it, and its determination will be reversed only upon a clear showing of an abuse of discretion.

No such showing is made here. Appellant's criticism makes no mention of the permanently damaging effect of the digging of this large, deep pit upon the properties of these plaintiffs, and upon their comfortable enjoyment of their homes, and to the safety of their children.

These are pleaded by *verified* complaint, in detail. These sworn allegations are supported by the illustrative map attached to the complaint, and by the affidavits of H. B. Lynch, R. L. Farley, Jeanne Moore, and Louise Taylor [Tr. pp. 566, 568, 573, and 575].

The learned trial court was not bound to accept, as against these persuasive evidences, the meagre and wholly improbable assertions and conclusions of Mr. Gregg.

These evidences show, and every reasonable and impartial mind will affirm, that the digging of such a pit, and *its presence permanently,* will create a danger and detriment to the adjacent properties, and to the comfort, health, and safety, of the inhabitants of this community, of such gravity, and certainty, that only by prohibiting the digging of the pit can these dangers and damage be avoided.

The disadvantages to Gregg by this restraint, are as nothing compared to the disadvantages to these plaintiffs if this restraint were denied. Under this restraint GREGG RETAINS HIS ROCK materials. They are not depreciating in value. Without this restraint WE LOSE FOREVER the

comfort and safety which his operations will impair and destroy.

The attraction, and danger, of such a pit to our children of tender years, is pleaded in realistic terms and is confirmed by the vital statistics of dead and injured in the gravel pits of this valley. The fence proposed is no barrier to children.

The monetary loss to Gregg in the standby expense of equipment and organization which he acquired and builded with full knowledge that for 21 years this area had been restricted against the rock industry, and that no change in the character of this area had occurred which would justify the lifting of this restriction, is nothing compared to the loss which resides in the fears of loving parents for the safety of their children, and the interference with our comfortable enjoyment of our homes, and the heavy depreciation in our meagre lifetime savings invested in our homes, which would follow, inevitably, any lifting of this restraint.

No restraint less than a restraint against the digging of this pit, will protect our constitutional rights. Less than this will permit the destruction of these rights to our permanent damage before relief can be obtained by trial and judgment.

None of these injuries is provided against by the decree in the State case to which we are not parties. That decree provides only that certain measures will be adopted by Gregg in his operations, if and when he may be able to obtain certain materials. This record does not show that this has been done. The doing of these things, if they could be done and were done, would not remove these dangers and detriments. They would only tend to minimize them.

But always the pit, this dangerous death trap to our children, and destroyer of our peace of mind, and threat to our property, would be with us. Against these nothing but the restraint imposed can protect us. To this protection, in right and justice, we are constitutionally entitled. To deny it would be inhuman, and a grave miscarriage of justice.

Gregg knows these facts. He knows that without this restraint, his operations would demoralize this community, and, one by one, these homes, these families, would be put on the hoof, and our investments would become his, at his own price, upon his own terms, at his own time. Such is the inexorable law of industrial progress without equitable restraint.

But our homes, our families, our investments, mean nothing to Gregg. All that counts with him is the money he can make by the destruction of a community in which he does not dwell, and of which he is no constructive part. He pleads for freedom to destroy us while we defend. The inevitable fruits of that freedom would be a judgment, *a bit of paper,* solemnly declaring in the language of our founding fathers, the unalterable supremacy of *human rights* over *material things,* but which would stand in marked contrast to a community of homes and humans laid waste in the ruthless *unrestrained* march of industrial greed.

At pages 29 and 30 of his brief, appellant sets forth the four conditions which the State Court annexed to the permit in its effort *to make reasonable* a legislative act which, in its enactment, *the Court found was unreasonable,* and states that he has complied with these four conditions, as shown by his affidavit [Tr. *id* 1, pp. 283, 284].

The statement IS *not true.* The four conditions which Gregg, in his affidavit, states he has complied with, are *not* the four conditions annexed by the State Court as set forth in Gregg's brief. They are the four conditions stated in the permit. *They have nothing to do with the control of dust and noise.*

Appellant's extended argument, therefore, that the learned District Court could have found, and should have found, on the basis of Gregg's affidavit, that there was no present, or reasonably prospective, danger or detriment to the health and comfort of the families of these plaintiffs, from the noise and dust created by Gregg's operations, finds no support in this record.

But, if Gregg had sworn as he could not truthfully do, that he had complied and was complying with the four conditions which the State Court found it necessary to annex to this permit, and that thereby the detriment of noise and dust had been eliminated, *nevertheless,* the District Court would not have been bound to accept, as the basis of its action, Gregg's statement as against the contrary statements of these plaintiffs under oath, and the judicial notice which a Court may take of the occurrence of such hazards as an incident to such operations (*McIvor v. Merced-Fraser Co.,* 76 A. C. A. 304).

Furthermore, appellant very carefully evades, in his discussion of this question, any reference to the detriments, *permanent in their nature,* which would flow from the presence in the heart of this residential community, of a pit one hundred feet, or more, in depth, with steep banks of loose material, and covering one hundred acres, or more, of land.

As alleged in plaintiffs' complaint, the process of digging such a pit, and its perpetuation permanently, would

very substantially depreciate, and in many instances, destroy the value of plaintiffs' property. It would create and constitute a permanent threat to destroy some substantial portions of plaintiffs properties, by the natural processes of erosion. It would create, and perpetuate, a permanent attraction and danger to the children of this community, as the vital statistics of our City confirm in respect of comparable situations.

The fact and force of these destructive conditions, no man may deny. Their ruinous influence upon a residential development and use of property is inescapably obvious, and the learned District Court did not err in enjoining their occurrence until this case could be tried upon its merits. To have denied this preliminary relief would have been a grievous miscarriage of justice, and a clear denial of the constitutional immunities guaranteed to these plaintiffs against *an unreasonable interference* with their enjoyment of their homes and investments.

It should be remembered that Gregg purchased this property at a time when it was restricted, and for more than fifteen years had been restricted, against the rock industry, under a zoning encouragement for the development of this community area as a residential community area. He knew, when he purchased this land, that this small community area, under that zoning encouragement and protection, had been improved with homes, churches, schools, parks, and other community facilities, and that the people of this area, and the Planning Commission; Board of Education; Park and Playground Department,

and teachers in the schools, were opposed to any encroachment of the rock industry.

In these circumstances, Gregg cannot plead for sympathy when denied the right to despoil this community for his personal monetary gain. Our homes are the most precious units in our society. Our children are the most valuable of our natural resources. It is the fundamental philosophy of the American way of life, that when the security of these conflicts with mere money making, the latter must yield (*ex parte Hadachek,* 165 Cal. 416, 421). *Upon the perpetuation of this doctrine rests the safety of our Republic.*

The cases cited by appellant do not support his criticism. Each of them recognizes the supremacy of human welfare over mere money making. In *People v. Hawley,* 207 Cal. 395, cited by appellant, at page 31 of his brief, the Court recognized the necessity for prohibiting an operation which *"might be objectionable to others."*

In re Smith, 143 Cal. 368, cited by appellant at page 32 of his brief, the Court said that it was proper to regulate industry in respect of *"the places thereof."*

Similarly, it will be observed that in each of the other cases cited, the Court was careful to observe, that a prohibition of industry is proper to the extent reasonably necessary to prevent interference with the health and welfare of the people in the community.

The injunction appealed from does not go beyond the limits of permissible judicial interference with industry for the preservation of homes.

V.

In the Circumstances Pleaded, the City Is Estopped to Grant This Permit, and Gregg Is Estopped to Exercise the Privilege It Purports to Confer.

Appellant again argues (his brief pp. 38 to 46, incl.) that the City may not be estopped in the exercise of its police power, and that if it could be estopped, relief must be sought in the State Courts.

Hereinbefore, we have shown, conclusively, that the sovereign may be estopped whenever *"right and justice"* demand it, and that equity has not yet cast all the molds into which the facts of any given case must fib, in order to invoke this doctrine.

Appellant seems unable, or unwilling, to grasp the import of the complaint here. He insists upon measuring the nature of this action, and the jurisdiction of the Court, by reference to only *four* of the *forty-six* paragraphs of the complaint (his brief p. 1). He views the remaining *forty-two* paragraphs as merely vague and obscure matters of inducement which lead up to an allegation of a conclusion of law, namely, that the City is estopped to grant, and Gregg is estopped to enjoy, this permit (his brief p. 38).

Thus, blinded by his unwillingness to see, he concludes that there is no estoppel pleaded, which arises by record, by deed, or by matter *in pais,* and, hence, no estoppel at all.

In this he is unsound. The complaint here is a simple complaint in equity. It rests upon the fundamental American doctrine that *"whenever right and justice require it,"* the sovereign will be estopped in the exercise of

its governmental functions to the substantial detriment of its subjects.

The complaint pleads, in chronological order, the natural adaptability in every respect, of this community area for *residential* development and use; the early recognition (1914) of this natural adaptability, by the owners who subdivided it for *residential* development and use, and, by deed restrictions, excluded the rock industry for the next twenty years; the early recognition (1925) of this residential adaptability and development, by the defendant City, and its choice, then made, to encourage a continuing *residential* development of this area by zoning classification, and the exclusion of the rock industry from it; the acceptance of this encouragement by a very heavy investment in homes; churches; schools; parks and playgrounds; paved streets, and other incidents of good community building, during the period of twenty-one years which intervened between the enactment of the first zoning ordinance (1925) and the grant of this permit (1946).

The complaint pleads that the residential character of this community was preserved, *it did not change,* until the grant of this permit, and that, *excepting for this permit,* the residential character of this community would continue, and expand, but that, if this permit is validated, the homes, community facilities, and heavy investments, that have been builded and made under that sovereign's encouragement of residential development for more than twenty years, will be practically destroyed.

The complaint concludes by alleging in general terms, that in the circumstances of this encouragement and acceptance, and *the utter absence of any substantial change in the residential character of this community,* it is an unreasonable exercise of its police power for the defendant

City to suddenly change its mind, and to permit the destruction of the natural fruits of its bidding—this splendid residential community, by the grant of this permit to excavate this one hundred and fifteen acre tract of land.

In these circumstances, and many more are pleaded, the complaint alleges that *"right and justice require"* that the City be estopped to grant, and that Gregg be estopped from enjoying, this permit.

Were it desired (it is not necessary) to relate this character of estoppel to some standard definition in the law, clearly, it may be denominated an "estoppel *in pais*." The facts pleaded bear a direct relation to each of the six elements of such an estoppel as stated in appellant's brief at page 40.

It is not necessary, however, that this appear. It is sufficient to show an *invitation, acceptance,* and *repudiation* without any change in circumstances, to the detriment of the citizen, to invoke the protection of the Fourteenth Amendment.

This is the rule of all of the cases, of which *Dobbins v. City of Los Angeles, supra,* is an exemplar—the relief granted is not affected by the name by which it is designated. Sometimes it is referred to as relief by estoppel, and sometimes it is referred to as relief by an injunctive process which strikes a dead limb from a legislative tree.

Significantly, appellant does not mention either the facts pleaded, or the law evidenced by a host of authorities, both text and case, which command the relief we seek. *Appellant is entirely familiar with these facts and with this law.* His failure to meet them, and his setting up of a straw man case, is the patent admission of a defeatist.

He cannot meet them. Confessedly, upon the full record here, the action of the learned District Court, of which appellant here complains, is unimpeachable.

Appellant entirely misconceives the purpose of our pleading of the facts which antedated the first zoning ordinance. We did not plead the early setting aside of this area for residential development, or the early restrictions by deed against the rock industry as something binding upon the City. We pleaded these only for the purpose of showing that the *"choice of use"* of the land within this area, as made by the City in 1925, *was a reasonable choice,* and served the best interests of the general public welfare, and that, since this was true then, *it remained true* through the long period of zoning protection, and it was true when this permit was granted, because the residential character of this community had not changed. That which we claim is binding upon the City now, is *the choice it then made,*—not the facts upon which that choice was based, and which made that choice a reasonable one, *then* and *now.*

Appellant fears that the supremacy of *"right and justice"* over whimsical changes of mind, or unreasonable preferment of an individual or of a class, in governmental affairs, may lead to a freezing of a zoning plan in the mold in which it was first cast, is unreal. If after a zoning plan has been adopted, such a change occurs in any area affected, that *"right and justice"* justify a change in the zoning plan, then, within the doctrine which we in-

voke, a reasonable change in zoning may be made. There *is no freezing.* But, if no such change in conditions occurs, then there cannot be any change in zoning to the prejudice of those who have acted, substantially, upon the encouragement and protection of that zoning, without compensation is made. In these circumstances *"right and justice"* command that the Sovereign, having made its choice, abide by that choice, unless compensation is made to those whose property would be adversely affected by the change. This is the doctrine of the *Dobbins* case, *supra,* and of the many other cases, both State and Federal, hereinbefore cited. *There is no authority to the contrary.*

Appellant argues that there cannot be any estoppel here, because the City, lifting itself by its boot straps, provided in its charter that it could amend or repeal its zoning ordinances, and that since we are presumed to know the law, we are bound by the City's charter reservation as the law.

The answer is obvious. The constitution and not the charter is the supreme law of the land. *The constitution is the law we are presumed to know.* The constitution says, as witness the *Dobbins* case, *supra,* that there can be no change in zoning policy without a justifying change in conditions, to the *detriment* of those affected. This constitutional limitation upon sovereign power cannot be evaded by a City by the expedient of adopting a charter which says it may do as it chooses. *The constitution is still there, and it is supreme.*

VI.

Is the Legislative Exercise of the Police Power Immune to Judicial Review?

Appellant suggests (his brief, pp. 26 to 50, incl.) that an act of a legislative body in the exercise of its police power, is immune to judicial review. This is contrary to all applicable authority.

Appellant's argument here confuses a challenge to the *motives* of a legislative body in the exercise of its police power, with a challenge to the *reasonableness* of its action. Concededly, the *"motives"* of a legislative body, as distinguished from the *"reasonableness"* of its action, are not open to challenge in any court except in some exceptional circumstances not present here.

But, the *"reasonableness"* of an exercise of police power is always open to challenge, and, when challenged, the question presented is a *judicial* question which the court will hear and determine *upon its own responsibility,* and *upon its own record,* and *the facts adduced before it. This is settled law.*

In *Mugler v. Kansas,* 31 L. Ed. 205, 211, 220, the Supreme Court of the United States said:

> *"The courts must obey the constitution rather than the law making department of government, and must upon their own responsibility, determine whether, in any particular case, these limits have been passed.*
>
> *"The 14th Amendment to the Federal Constitution forbids any arbitrary deprivation of life, or liberty, and the arbitrary spoliation of property.*
>
> *"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at*

liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.

"If, therefore, a statute purporting to have been enacted to protect the public morals, or the public health, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

"We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights, requires that the federal court should determine such an issue upon its own record, and the facts adduced before it."

In 5 Cal. Jur. Sec. 122, p. 719, the rule is stated to be:

"If a statute purporting to have been enacted to preserve public health, morals, and safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the Constitution. If this were not so, as has been well said, the constitutional guarantees of the personal right to liberty and property would be wholly subject to the will of the majority acting through the legislature."

In *Crowell v. Benson*, 76 L. Ed. 598, 618, the Supreme Court of the United States, said:

"In the present instance the argument that the Congress has constituted the deputy commissioner a fact finding tribunal, is unavailing, as the contention makes the untenable assumption that the constitutional

courts may be deprived in all cases of this determination of facts upon evidence even though a constitutional right may be involved.

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative. The ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owners to be entitled to a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

In *Ruben v. Board,* 16 Cal. (2d) 119, at page 126, the Supreme Court of California, said:

"The finality of the board of directors' determination does not bar the respondents from asserting in a judicial proceeding that the zoning law is unconstitutional as applied to their property.

"Although the same type of evidence may be used in that proceeding as was presented to the zoning committee and board of directors in support of the application to secure the variance, the issues are not the same and its denial is not res judicata upon the constitutional question."

In *In re Hall,* 50 Cal. App. 786, 790, the Court said:

"When the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the constitution, is absolute. It has no discretion in the matter."

In *In re Junqua,* 10 Cal. App. 602, 603, the Court said:

> *"And where it appears, either upon its face or from competent evidence extrinsic to the measure itself, that such regulation is unjustly oppressive or unreasonably burdensome in the restrictions prescribed or the conditions it imposes, it will be held void as violative of the constitutional guaranties of the citizens, for the doctrine, once maintained by the courts, that where an ordinance is reasonably within a proper consideration of and for the public health, safety and comfort, a court will not disturb the legislative act, upon the theory that the legislature has investigated and found the facts of which it has predicated the measure, which constitutes a legislative judgment with reference thereto which is final and conclusive upon the court, has been exploded, at least in this State."*

These authorities are clear and controlling. They refute, utterly, appellant's contention.

In *Abbey Land Co. v. San Mateo,* 167 Cal. 437, the Supreme Court of California, said:

> *"The court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance."*

Appellant's argument confuses the vital difference in the permissible scope of review in a proceeding in mandamus or certiorari, and in a suit in equity.

This is *not* a proceeding either in mandamus or in certiorari. *It is a suit in equity.* All controlling authority, as heretofore shown, is clear, positive and uniform, in the statement of the rule that in a suit in equity, where the constitutionality of the exercise of the police power,

or an estoppel, is presented for determination, the questions presented are *judicial* questions, and that in their determination it is the right and the duty of the Court to exercise its own independent judgment upon both the law and the facts, upon its own independent and full judicial investigation.

It is unmistakably clear, therefore, that when the reasonableness of an exercise of the legislative function under the police power is presented to the Court, as a judicial question in a suit in equity, the Court does not function on a basis of equality with the legislative agency. It functions as a judicial agency *that is constitutionally superior* to the legislative agency, in respect of that determination.

VII.

In Accepting Jurisdiction the District Court Did Not Err Either Under the Judicial Code, or the Doctrine of Comity.

Appellant's criticism of the District Court, in accepting jurisdiction here, rests upon two obvious fallacies. These are (1) that these plaintiffs, in substance, previously invoked the jurisdiction of the State Court for the relief they seek here, and are bound to pursue that remedy exclusively, and (2) that these plaintiffs, if entitled to the relief they seek, can obtain that relief, presumably in that pending state case (his brief, pp. 51 to 62, incl.).

As to the Parties in Interest in the Pending State Case.

None of the plaintiffs here is, or ever has been, a party to the pending State case.

Notwithstanding this fact, this appellant states (his brief, p. 52, line 7) that "*it is apparent that the real parties*

in interest are identical in both suits." This is the genesis of his criticism.

But, *the undeniable conclusion* is that the plaintiffs *here* and the plaintiffs *there,* are not identical either in fact or in law—since these plaintiffs are not, *in fact,* plaintiffs in the State case, this appellant states that they are, *in law,* plaintiffs in the State case because the plaintiffs in the State case pleaded that the State action was begun on behalf of *"all others similarly situated."*

But, *it is settled law,* that such a pleading does not bring in, as parties plaintiff, any person who, although similarly situated, does not join in the action, or accept the benefits of the action (*In Matter Cent. Irr. Dist.,* 117 Cal. 382, 388; *Haese v. Heitzig,* 159 Cal. 569, 573, 574; *Compton v. Jessup,* 68 Fed. 263; *Ex Parte Howard,* 19 L. Ed. 634; *Freeman on Judgments,* Vol. 1, pp. 952, 956). Under these authorities, the *"class action"* rule which applies in some jurisdictions, *does not apply in California.*

There is not, and cannot be, any showing here that any of these plaintiffs ever accepted any of the benefits of the pending State case. As a matter of fact, up to the present time, no benefits have accrued in the State case even to those who are parties plaintiff therein.

Appellant's criticism, therefore, is unavailing. Its dignity is not greater than the error from which it stems.

As to the Relief Which the Plaintiffs Here Could Obtain in the State Case.

Indisputably, the parties plaintiff here cannot apply for, or obtain, any relief in the pending State case to which they are not parties either in fact or in law.

Furthermore, *if they were* parties plaintiff in the pending State case, they could not obtain in that case the pre-

ventive relief they seek here to maintain a *status quo* pending a final determination of the validity of the permit challenged there and here.

This is true because in the State case there was no restraint at the time of judgment and appeal, and in those circumstances, the Appellate Courts in California have no jurisdiction to enjoin Gregg's operations pending the appeal in that case (*Hicks v. Michael,* 15 Cal. 107; *Napa etc. v. Calistoga,* 174 Cal. 411; *McCann v. Union Bk.,* 4 Cal. (2d) 24, 27; *Seltzer v. Musicians, etc.,* 12 Cal. (2d) 718, 719; *Canavaris v. Theatres, etc.,* 15 Cal. (2d) 495, 500; *Oklahoma Gas Co. v. Russell,* 261 U. S. 293).

For the reasons above stated the doctrine of comity does not apply. This is the clear holding of the cases hereinabove cited, and of *Merced Dredging Co. v. Merced County,* 67 Fed. Supp. pp. 598, 605, where the Court said:

> *"Rules of comity or convenience, must give way to constitutional rights, and when the case presented is one where a federal court of equity should intervene, it will not hesitate to do so."*

Upon the record here, it is a necessary conclusion that these plaintiffs are not precluded from pursuing their remedy in the federal court for a violation of their immunities under the Fourteenth Amendment, simply because *other persons aggrieved,* as to their properties, by the same unconstitutional exercise of the police power, have pursued, and are pursuing a remedy in the State Court. The plaintiffs here are not required to hazard their constitutional rights upon the outcome of a case to which they are not parties; in the prosecution of which they have no voice; in which they cannot apply for, or obtain, any personal relief, and which is being prosecuted in a jurisdiction they did not select.

Assuming that these plaintiffs could have pursued in the State Court, the remedy they seek here, nevertheless, they were not bound to do so (*Porter v. Inv. Synd.*, 286 U. S. 471, 76 L. Ed. 1226; *Bacon v. Rutland R. R. Co.*, 232 U. S. 134).

The good judgment of these plaintiffs in seeking their remedy in a Federal Court for a violation by the State of their rights under the Federal Constitution, instead of pursuing their alternative remedy in the courts of the State whose agency violated their federal constitutional rights, is fully demonstrated by the marked contrast in what has happened to date to the plaintiffs in the State case, and what has happened to date to the plaintiffs in this case. Without this intervention of the District Court in this case, these plaintiffs, and all others similarly aggrieved, would be irreparably ruined before any relief could otherwise be obtained.

It is appropriate that we should here record our profound conviction that the *Appellate* Courts of the State of California, upon the pending appeal in the State case, will vindicate the Judiciary of that State by declaring void, under both the State and the Federal constitutions, the unreasonable exercise of the police power of that State under challenge there and here.

The learned Judge of the *trial* court in the State case, bottomed his decision against the plaintiffs in that case upon the wholly untenable thesis that (1) it is almost impossible to prove an estoppel against a public body, without proof of actual fraud; (2) a person cannot acquire a vested right as to another man's use of his own property; (3) a Court may not annul a legislative act where a question of policy is involved; (4) if there was any evidence of substance, before the City Council in re-

spect of this grant, then the findings of the Council are final, and binding upon the Court, however much the Court might believe that the grant was inexpedient, inadvisable, and unnecessary; (5) it would be an arrogance of the judiciary, and an unwarranted usurpation of power in regard to an equal department of the government, for a Court to set aside a determination of a legislative body, in the presence of contradictory evidence of substance before that legislative body, and (6) if the matter before the legislative body is a subject of legitimate debate, then the Court is without power to do anything in regard to the act.

Hereinbefore, we respectfully submit, we have demonstrated that each of these six concepts is erroneous. In brief recapitulation we remind the Court that:

(1) Fraud is not an essential element of an estoppel *in pais* against a governmental body. No case holds that it is. All of the cases rest its invocation upon the unfairness of the action, regardless of intent, whether express or implied, and estop the public body where *"justice and right require it."* The effect, and not the cause, of the action complained of, determines the estoppel.

(2) The "right" which one man has under a zoning regulation, in respect of another man's use of his own property in the zonal district, is a substantial right. Whether "vested" or not, under academic definition, it is, nevertheless, entirely sufficient as a basis for his challenge to the constitutionality of a proposed change in the permissive use of the other man's property *in the absence of a substantial change in conditions,* and, also, for him to compel the other man's obedience to the zoning restrictions in respect of the use of his property.

(3) All legislation involves, in some degree, a determination of policy by the legislative body. But this determination of policy does not bar—it provokes—judicial interference when the policy as determined passes beyond the constitutional limits of the policy making function.

(4) The theory of finality has long since been "exploded" as the law in California in a proceeding (which this is) which challenges the constitutionality of legislative action (*In re Junqua,* 10 Cal. App. 602, 603). The theory of finality applies only in proceedings in mandamus and certiorari (*which this is not*). In a challenge to the *constitutionality* of an legislative act, *it is the duty of the Court* to make its own independent determination of both law and fact, upon its own independent judicial investigation and record.

(5) The performance of its sworn constitutional duty to measure a legislative act with its constitutional limitations, and to annul that act when it exceeds those limitations, *is not* an *"arrogance of the judiciary."* A failure or refusal to perform that duty *is an "abdication of judicial duty",* and is a violation of an individual's sacred constitutional right. In respect of the exercise of this *supreme function,* the legislative and judicial branches of our government are not equal. *The judicial branch is superior and supreme.*

(6) The legislative body is not *omnipotent* (*Ex parte Whitwell,* 96 Cal. 73, 77). The nature, and extent of the evidence, and *whether there is any evidence at all,* before the legislative body, *is wholly* immaterial in a suit in equity which challenges the *reasonableness—constitutionality*—of the legislative act, and invokes an estoppel against that act. The legislative body is not required to say *why* it enacted any particular legislation under attack. It is for the Court

to say, in the exercise of its *supreme judicial function, not why* the legislative action was taken, but *whether* the action taken was within the constitutional limits of legislative power (*Mugler v. Kansas,* 31 L. Ed. 205, 211; *In re Hall,* 5 Cal. App. 786, 790; *Abbey Land Co. v. San Mateo,* 167 Cal. 437; *Crowell v. Benson,* 76 L. Ed. 598; *In re Junqua,* 10 Cal. App. 602).

Conclusion.

In conclusion, we respectfully submit that the complaint here pleads a strong and compelling case for equitable relief under the Fourteenth Amendment to the Federal Constitution; that the question presented is a federal question cognizable in the Federal Courts; that the action pending in the State Courts upon behalf of persons who are not parties to this action, and to which the plaintiffs here are not parties either in fact or in law, does not bar or suspend the jurisdiction of the court in this case; that the preliminary injunction here appealed from is not broader in its scope than is reasonably required by the exigencies of the case at bar, and that the learned Chancellor of the District Court did not err in granting this preventive relief to maintain a *status quo* until trial and judgment upon the merits.

It must be remembered that the applicable rule is that

> *"where the questions presented by an application for a preliminary injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the other party, even if the final decree be in his favor, will be considerably less, the injunction will be granted* (Ohio Oil Co. v. Conway, 279 U. S. 813, 815; 73 L. Ed. 972)."

In its grant of the Preliminary Injunction here appealed from, the learned District Court did nothing more than to exercise the power conferred, and to perform the plain duty imposed, upon that Court by the Constitution and the laws of the United States (*Thornton v. Rose Imp. Dist. No. 1,* 291 Fed. Rep. 518).

The power and the duty of the Court has been clearly defined and vigorously asserted by the Supreme Court of California, in the recent case (1946), of *In re Porterfield,* 28 Cal. (2d) 91, where, speaking at page 103, the Court said:

> *"We unequivocally recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties. Those freedoms are vastly more consequential than any object to be attained by business or professional regulations, and the integrity of the former is not to be compromised to save the latter."*

The principle of the unalterable supremacy of the home and the family over material gain, must be frozen in the workaday philosophy of our Republic, lest it perish from the earth.

We respectfully submit that the order appealed from should be affirmed.

OLIVER O. CLARK,
ROBERT A. SMITH,
Attorneys for Appellees.